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In the Supreme Court of the United States

OCTOBER TERM, 1976

RICHARD DEVINCENT and ROBERT VISCONTI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 546 F. 2d 452.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 1976. Mr. Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including February 4, 1977; the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the statutory list of factors that establish a prima facie case that an extension of credit is extortionate creates a constitutionally invalid "presumption."

2. Whether the district court erred in admitting testimony about the debtor's knowledge that petitioner DeVincent had been indicted for murder.

STATEMENT

After a jury trial in the United States District Court for the District of Massachusetts, petitioners were convicted of conspiring to make and of making an extortionate extension of credit, in violation of 18 U.S.C. 892.[1] Each was sentenced to eight years' imprisonment and fined $10,000.

1. In early 1974 Peter J. Pallotta contacted petitioner DeVincent, seeking money to finance a nightclub (I App. 144-146).[2] Pallotta, who met DeVincent 20 years earlier while both were in prison, knew from a variety of sources, including DeVincent himself, that DeVincent had been convicted of loansharking, had been indicted and acquitted of murder, and had a reputation as a "head crusher" or loanshark enforcer (I App. 158-161, 166). DeVincent agreed to lend Pallotta $700 at "[f]our points, $28 a week," and explained: "Peter, you know, it is bad money" (I App. 147, 150).[3]

Pallotta agreed to pay the $28 interest weekly until he had accumulated $700 with which to make a lump sum repayment of the principal (I App. 151-152). DeVincent directed petitioner Visconti to give Pallotta $700 (I App.

[1]Petitioners were acquitted of a second extortionate extension of credit and conspiracy to use extortionate means to collect the extension of credit.

[2]"App." refers to the three-volume appendix in the court of appeals.

[3]"Bad money" is a loan that must be paid back or the debtor "would be hurt" (I App. 167).

151).[4] Visconti repeated DeVincent's earlier statement that the $700 was "bad money" (*ibid.*).

Pallotta's nightclub business lagged, and he fell behind in his payments. DeVincent called Pallotta, demanded money, and said he would come to see him (I App. 179-180). DeVincent also came to the nightclub and warned Pallotta that he would mutilate him with an ice pick if payment were not forthcoming (I App. 180-181). Frightened, Pallotta began to make double payments (I App. 182-183). When Pallotta again fell in arrears, DeVincent threatened to break Pallotta's legs (I App. 184).

The nightclub eventually failed. Fearing physical injury, Pallotta went into hiding (I App. 190-191). In November 1974 he contacted the Federal Bureau of Investigation and was placed in protective custody. With Pallotta's consent, federal agents recorded three telephone conversations between Pallotta and Visconti and two between Pallotta and DeVincent (*id.* at 191-192). The tapes were played at trial and confirmed that the $700 loan at four percent weekly interest had been made by DeVincent and Visconti (II App. 401, 404-405).[5]

Petitioners' defense was that neither they nor Pallotta had the requisite "understanding" that violence would be used to collect the loan or delinquent payments. Petitioners extensively attacked Pallotta's credibility (see, *e.g.*, I App. 197, 209, 214-215, 287; II App. 476-477, 518-519, 542-544, 559).

[4]Pallotta had not met petitioner Visconti before, but he had heard of his conviction for loanshark activity and his reputation as a loanshark enforcer (I App. 152, 157-158).

[5]Petitioners stipulated that the loan, if made as described, would be uncollectable under Massachusetts law (II App. 434).

2. When the district court charged the jury on the essential elements of 18 U.S.C. 892, it twice repeated the definition of an extortionate extension of credit set forth in Section 891(6), thereby emphasizing that the crimes charged involved "the understanding of the creditor and the debtor" (III App. 684, 685). The court then charged (III App. 689-690; emphasis added):

> I instruct you * * * that in order to sustain this burden of proof * * * the government must prove beyond a reasonable doubt with regard to each defendant the following: (1) That on or about the last week of April, 1974, $700 was loaned or advanced to Peter J. Pallotta by the defendants; and, secondly, that there was an actual deferment of the repayment of that loan with the *mutual understanding on the part of Pallotta and the defendants* that if there were delays in making repayment or a failure to make repayment that violence or other criminal means to cause harm to Pallotta would be employed by the defendants; third, that the defendants knowingly and willfully made the extortionate extension of credit.
>
> There are three essential elements which must be proven beyond a reasonable doubt as to each defendant * * *: First, that he made an extension of about $700 to Pallotta; secondly, that *there was an understanding between the defendant and Pallotta*, express or implied, tacit or otherwise, that if Pallotta delayed in making his repayments or there was a total failure to repay, that violence or other criminal means would be used to harm Pallotta; and thirdly, in so doing the defendant acted knowingly, willfully and unlawfully.

The court told the jury that it could employ a number of permissible inferences in deciding whether petitioners and Pallotta had the requisite understanding. It stated "that a person normally intends the natural and probable consequences of an act he knowingly did or knowingly omitted" (III App. 680) and that (*id.* at 696-697):

> I want to tell you there are two ways in which the government can prove the extensions of credit were extortionate, if you find the extensions of credit were made: The government can prove extensions of credit were extortionate either by direct evidence of the actual belief of Pallotta as to the defendants' collection practices or by establishing the following four facts: [the court then paraphrased the elements of Section 892(b)].

3. The court of appeals affirmed. It held that the four factors enumerated in Section 892(b)—that the extension of credit could not be collected through lawful processes, that the interest exceeded 45 percent per year, that the debtor knew that the creditor had made other extortionate loans, and that the loan exceeded $100—if established, would support a conclusion beyond a reasonable doubt that petitioners and Pallotta had the requisite understanding (Pet. App. 4a-5a). The court of appeals also considered and rejected petitioners' numerous objections to the introduction of evidence (*id.* at 7a-8a).

ARGUMENT

1. Petitioners contend (Pet. 6-11) that the use of the four factors enumerated in 18 U.S.C. 892(b) creates a "presumption" of guilt that is prohibited by the Due Process Clause. Petitioners concede (Pet. 10), however, that the instant case is the first to consider such an argument. In the absence of a conflict among the circuits, there is no reason for review by this Court. Petitioners, moreover, misinterpret both the statutory scheme and the opinion of the court of appeals.

Section 892(b) provides that if the jury finds four factors—(1) that repayment of the loan is civilly unenforceable; (2) that the annual interest rate on the loan exceeds 45 per cent; (3) that the debtor reasonably believes when the loan is made that the creditor has used or has a reputation for using extortionate means to collect other debts; and (4) that the total amount of the loan exceeds $100—then the prosecution has established "prima facie evidence that the extension of credit was extortionate." The statute elsewhere provides that an extension of credit is extortionate if both debtor and creditor believed at the time the loan was made that force would be used to collect it.

Petitioners contend that the four factors enumerated in Section 892(b) create an unconstitutional "presumption" relieving the prosecution of its burden of proof. They rely primarily upon *Leary* v. *United States*, 395 U.S. 6. But in *Leary* the "presumption" was mandatory, and, as this Court concluded, contrary to fact. Section 892(b), on the other hand, simply enumerates four factors that establish "prima facie evidence" and allow the case to go to the jury, which is free to draw such inferences as are warranted by the evidence. The inferences, moreover, are consistent with experience and therefore do not offend due process principles. *Barnes* v. *United States*, 412 U.S. 837.

The court of appeals held—correctly, we submit—that the factors listed in Section 892(b) are highly pertinent to proving the understanding of the parties, and that if all four factors are established the existence of an understanding that force would be used follows almost inexorably. At a minimum, the presence of the four factors demonstrates the presence of the "understanding" that Congress made criminal; the inferences to be drawn from proof of the four factors, and the meaning of the requirement of an "understanding" about methods of collection, are closely related in the legislative scheme.

In the light of common experience, the inference of the use of extortionate means from the foregoing factors seems strong enough to make it constitutionally permissible to put the burden on the defendant to come forward with evidence to show the innocent nature of the transaction, if such was the case. In arms length transactions, *people simply do not lend sums of money at exorbitant rates of interest under circumstances where they cannot enforce the obligation to repay*. Where the prosecution has shown the absence of legal means to enforce the obligation, it is a reasonable inference, in the absence of evidence to the contrary, that illegal means were contemplated. Any debtor who deals with a creditor under these circumstances, knowing or reasonably believing that the creditor has used extortionate means in the past, may be fairly surmised to know what he is getting into. [H.R. Conf. Rep. No. 90-1397, 90th Cong., 2d Sess. 29 (1968); emphasis added.]

See also *Perez* v. *United States*, 402 U.S. 146, 155-156; *United States* v. *Annoreno*, 460 F. 2d 1303, 1309 (C.A. 7), certiorari denied, 409 U.S. 852. Since the meaning of the requirement of an "understanding" must be viewed in the light of the proof Congress provided would establish that "understanding," the use of the four factors of Section 892(b) satisfies "the reasonable-doubt standard * * * as well as the more-likely-than-not standard, [and] clearly accords with due process." *Barnes* v. *United States, supra*, 412 U.S. at 843.

The court of appeals did not take inconsistent positions by explaining both "that the statute makes the understanding of both the creditor and the debtor crucial" to prove a statutory violation (Pet. App. 3a) and that "[w]hen a man with a reputation for violent collection tactics loans

more than $100 at an exorbitant rate of interest, and the loan cannot be collected by legal means, we think it highly probable that the loan is 'extortionate' within the meaning of §892" (*id.* at 4a). The court has simply stated the same common-sense conclusion that the statute permits.[6]

2. To establish Pallotta's understanding that violence or other criminal means would be used to enforce repayment of the loan, the prosecution presented testimony that Pallotta knew that DeVincent had been indicted for murder. Petitioners moved for a mistrial on the ground that this evidence was prejudicial. Petitioners argued that Pallotta previously had said that he was unaware of the indictment at the time the loan was made. The court denied the motion for a mistrial and instructed the jury that Pallotta's testimony regarding petitioners' past acts could be considered solely to establish Pallotta's state of mind (see I App. 161-166). On cross-examination DeVincent impeached Pallotta with the transcript of a telephone conversation, taped while Pallotta was in protective custody, between Pallotta and another of his creditors, in which Pallotta appeared to know very little about DeVincent's indictment (I App. 293-296). Pallotta explained that he had known about the indictment and was simply trying "to draw out" his other creditor to reveal information that might be useful in a prosecution against that creditor (I App. 294-295, 297).

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[6]Petitioners contend (Pet. 6, 8-9) that the instant case is inconsistent with *Michaelson* v. *United States*, 335 U.S. 469. *Michaelson* involved the introduction of "reputation" evidence in general; the Court explained that the prosecution could not introduce evidence of a defendant's bad deeds or reputation in an attempt to show that, as a "bad man," the defendant was apt to be guilty of crime. Here, by contrast, any use of reputation evidence is explicitly authorized by Section 892(b)(3) because it is pertinent to an element of the offense— the borrower's understanding of the lender's willingness to use force to obtain repayment.

Petitioners now contend (Pet. 11-15) that the district court should have considered Pallotta's prior inconsistent statement in determining whether to admit Pallotta's testimony that he knew of the murder indictment when the loan was made.[7] But the record does not establish that the court failed to take that statement into account.[8] In any event, Pallotta satisfactorily explained the apparently inconsistent statements, and his testimony, if believed, established that he knew of the indictment at the time the loan was made. The jury was repeatedly instructed that the evidence was to be used for only a limited purpose (see Pet. App. 7a), and the district court did not abuse its discretion in admitting it.[9]

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[7]Pallotta's awareness of the indictment was relevant to establish his understanding regarding the extension of credit only if he had that knowledge when the loan was made.

[8]The record does not support petitioners' allegation (Pet. 13) that the district court "was of the view that the prior inconsistent statements related only to the issue of [Pallotta's] credibility." It was on petitioners' request that the court instructed the jury to consider the prior inconsistent statements solely as impeaching testimony (I App. 296-297).

[9]Petitioners also allege (Pet. 12) that the district court's "refusal to consider Pallotta's prior inconsistent statements on the question of admissibility" conflicts with *United States* v. *Bailey*, 505 F. 2d 417 (C.A.D.C.), certiorari denied *sub nom. Sloan* v. *United States*, 420 U.S. 961; *United States* v. *Clemons*, 503 F. 2d 486 (C.A. 8); *United States* v. *Ostrowsky*, 501 F. 2d 318 (C.A. 7); and *United States* v. *Burkhart*, 458 F. 2d 201 (C.A. 10), which held that the reliability of evidence of prior bad acts must be established before being admitted. In those cases, however, the relevance of the proffered evidence turned on whether the past acts had in fact been committed and not, as here, on the witness's knowledge of those acts. Those cases therefore do not conflict with the instant case. Moreover, petitioners concede (Pet. 13) that DeVincent had been indicted, as Pallotta maintained. In any event, in light of Pallotta's explanation, the evidence was "clear and convincing" that he knew of the indictment when the credit was extended, thus satisfying the standard of proof required in *Clemons*, *Ostrowsky*, and *Burkhart*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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